

UTE MOUNTAIN UTE TRIBE

v.

ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS

IBIA 83-24-A

Decided April 19, 1983

Appeal from a decision of the Acting Assistant Secretary for Indian Affairs affirming a decision not to approve Ute Mountain Ute Tribal Resolution No. 2916 concerning imposition of an oil and gas severance tax.

Dismissed.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals has no jurisdiction to review decisions of the Acting Assistant Secretary for Indian Affairs except as those decisions may be referred to it on a case-by-case basis or through rulemaking.

APPEARANCES: John J. D'Onofrio, Esq., Denver, Colorado, for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On April 4, 1983, the Board of Indian Appeals received a notice of appeal from the Ute Mountain Ute Tribe, through counsel, John J. D'Onofrio, Esq., Denver, Colorado, seeking review of a March 1, 1983, decision of the Acting Assistant Secretary for Indian Affairs regarding disapproval of an oil and gas severance tax imposed by Tribal Resolution No. 2916. The appeal is hereby docketed under the above case name and number. For the reasons discussed below, the Board is constrained to dismiss the appeal.

Background

On May 20, 1982, the Ute Mountain Ute Tribal Council passed Resolution No. 2916, enacting a severance tax ordinance. Under the provisions of the tribal constitution, approved by the Secretary of the Interior on May 23, 1940, the resolution was referred to the Superintendent of the Ute Mountain Ute Agency, Bureau of Indian Affairs, for review. Article V, section 3, of the tribe's constitution provides that the Superintendent "shall, within two weeks * * * [after receiving a resolution for approval], approve or disapprove the same." If the resolution is approved, it becomes effective immediately subject to a 90-day period in which the Secretary of the Interior may disapprove the resolution. If the resolution is disapproved, the Superintendent "shall advise the Tribal Council of his reasons. The Tribal Council may by a majority vote refer the ordinance or resolution to the Secretary of the Interior who may within 90 days from its enactment, approve

the same in writing, whereupon the said ordinance or resolution shall become effective."

The Superintendent did not advise the tribe of the disapproval of the resolution within the 2-week period established in the constitution. Therefore, according to accepted custom and practice, the tribe believed that the resolution had been approved. The 90-day period provided for Secretarial review of the resolution expired on August 18, 1982. This period similarly passed without notice to the tribe that the resolution had been disapproved. The tribe therefore again believed that the resolution had been approved by the Department.

On October 8, 1982, the Albuquerque Area Director informed the tribe that the resolution was disapproved. This decision was based upon the determination that the Superintendent had neither approved nor disapproved the resolution and that, therefore, the 90-day period for Secretarial review had never begun to run.

The tribe sought review of this decision through the administrative review channels established in 25 CFR Part 2. Part 2 provides that the Commissioner of Indian Affairs shall review decisions issued by Area Directors. Because the position of Commissioner was vacant, the tribe sent its notice of appeal to the Assistant Secretary for Indian Affairs, expecting that it would be referred to the appropriate office in accordance with the provisions of 25 CFR 2.13. ^{1/}

^{1/} Section 2.13 states in pertinent part that "[a] notice of appeal and/or appeal received in an office other than that to which it should be properly addressed shall be transmitted to the proper office and the appellant advised."

The official currently exercising the review authority delegated to the Commissioner is the Deputy Assistant Secretary--Indian Affairs (Operations). ^{2/} The decision in the tribe's appeal, issued on March 1, 1983, was signed by John W. Fritz, the current Deputy Assistant Secretary--Indian Affairs (Operations), in the capacity of Acting Assistant Secretary for Indian Affairs. That decision was apparently based both on the finding that the Superintendent did not approve the resolution and that the resolution did not meet the requirements of a document entitled "Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities," dated January 18, 1983, and signed by the Assistant Secretary for Indian Affairs. The tribe sought Board review of this decision.

Jurisdiction

The tribe alleges that the decision in its appeal should have been referred to the Deputy Assistant Secretary--Indian Affairs (Operations), under the provisions of 25 CFR 2.13, rather than being retained and decided by the Office of the Assistant Secretary. If the appeal had been so referred, the Board would apparently have jurisdiction over it. The Board has general review authority over decisions of the Deputy Assistant Secretary--Indian Affairs (Operations), which involve the interpretation of law. See 25 CFR 2.19 and 43 CFR 4.330. This appeal raises the legal questions of whether the specific tribal resolution at issue was properly disapproved both

^{2/} See Memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

procedurally and substantively on the basis of guidelines issued after the passage of the resolution and not published in the Federal Register. ^{3/}

The case also raises broader legal questions concerning the authority of the Bureau of Indian Affairs to disapprove tribal resolutions after the expiration of time periods established in tribal constitutions and apparently through long-established custom and usage, ^{4/} and therefore in violation of the mutually agreed framework for interaction between two sovereign powers. These questions, as the tribe states, have far-reaching implications, potentially affecting all Indian tribes, concerning the way in which the Bureau of Indian Affairs discharges the government-to-government relationship between the United States of America and the Indian tribes.

[1] However, the decision in this case was not signed by John Fritz as Deputy Assistant Secretary--Indian Affairs (Operations), but rather by him as Acting Assistant Secretary. The Board has held that it does not have review authority over decisions of the Assistant Secretary except as those decisions may be specially referred to it on a case-by-case basis or through rulemaking. Willie v. Commissioner of Indian Affairs, 10 IBIA 135, 136-39 (1982). ^{5/} This

^{3/} See 5 U.S.C. § 552(a)(1) (1976); Morton v. Ruiz, 415 U.S. 199 (1974); Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982); Shoshone and Arapahoe Tribes v. Commissioner of Indian Affairs, 9 IBIA 263, 89 I.D. 200 (1982).

^{4/} Section 1.4(A) of the Jan. 18, 1983, guidelines, supra, states: "The Superintendent will review the ordinance in accordance with the review authority and time limits, if any, provided for the Superintendent's action in the tribal constitution."

^{5/} The referral to the Board of decisions rendered by the Assistant Secretary has occurred on a case-by-case basis in several ways. In Melsheimer v. Assistant Secretary for Indian Affairs, 11 IBIA 155, 90 I.D. 165 (1983), the Board acquired jurisdiction when the Assistant Secretary stated in the decision appealed from that the parties could appeal to the Board of Indian Appeals. Recently the Board docketed an appeal filed by the Pueblo of Laguna

holding must also apply when decisions are signed by the Acting Assistant Secretary.

Because the decision in this case was issued by the Acting Assistant Secretary for Indian Affairs and was not specially referred to the Board of Indian Appeals, the Board has no jurisdiction to review the decision. Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal must, therefore, be dismissed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Jerry Muskrat
Administrative Judge

fn. 5 (continued)

from action taken by the Assistant Secretary when, following a request by the appellant to the Secretary of the Interior, the Secretary requested that the Board of Indian Appeals review the Assistant Secretary's decision. Docket No. IBIA 83-23-A, predocketing notice issued Mar. 29, 1983. For an example of the use of rulemaking by the Assistant Secretary to render certain matters decided by him appealable to the Board, see 25 CFR 13.15.

The Board noted in Willie, supra at 138 n.13, that in promulgating the regulations providing for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: "'Exercise of the Secretary's review authority by the Board of Indian Appeals will insure impartial review free from organizational conflict in that the Board is a part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs,' 40 FR 20819 (May 13, 1975)."